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HO TZE KEAN v. PP & ANOTHER APPEAL

COURT OF APPEAL, SANDAKAN
DAVID WONG DAK WAH JCA
HAMID SULTAN ABU BACKER JCA
KAMARDIN HASHIM JCA

B

[CRIMINAL APPEALS NO: S-05(M)-225-06-2016
& S-05(LB)-179-05-2017]
8 JANUARY 2018

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CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) –Trafficking in 124.04g of methamphetamine – Drugs found in car – Accused convicted and sentenced to death by trial judge – Appeal against conviction and sentence – Defence of innocent carrier – Whether considered by trial judge – Whether accused was under arrest when he uttered words amounting to admission of knowledge of drugs – Whether statutory caution administered – Whether s. 114(g) of Evidence Act 1950*

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ought to be invoked against prosecution

CRIMINAL PROCEDURE: *Statements – Cautioned statement – Trial judge admitted statement by accused to impute knowledge of dangerous drugs – Whether accused was arrested – Whether statutory caution administered – Whether caution explained to accused – Whether a misdirection – Dangerous Drugs Act 1952, s. 37B(1)(b)*

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Acting on information received, PW7 and a team of policemen proceeded to a specified location. After 25 minutes, a black Kancil ('the said Kancil') came to the location. There was only one man inside the car, later identified as the accused. The police team then rushed to the car and apprehended the accused. Upon inspection, the police found one plastic bag, cream in colour, placed in the front passenger seat of the said Kancil. PW7 then conducted further checks on the cream plastic bag and found two black plastic packet inside it. Inside the two plastic packets, PW7 found four transparent plastic packets containing crystalised substance suspected to be 124.04g of methamphetamine the subject matter of the first charge. Further investigation was carried out which led the police to the accused's house where seven transparent plastic packets containing crystallised substances suspected to be methamphetamine were found the subject matter of the second charge. The accused was then charged with two offences of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The accused was acquitted and discharged of the second charge at the end of the prosecution's case. However, the learned trial judge ordered the accused to enter defence on the first charge. The trial judge held that the prosecution had proven the element of possession by way of direct evidence based on the fact that the accused was alone in the said Kancil car together with the impugned drugs found in the front passenger's seat of the said Kancil car. Therefore, the trial judge found that the accused had custody and control of the said drugs. As for the element of knowledge, the trial judge accepted the evidence

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of PW7 that the accused had uttered the words 'Ada syabu di dalam plastik krim di sebelah kerusi bahagian penumpang' in response to PW7's question. The trial judge did not invoke the presumption under s. 37(d) of the Act. As for the element of trafficking, the trial judge invoked the presumption of trafficking under s. 37(da)(xvi) of the Act as the amount of the drugs involved was more than the minimum weight of 50g as provided under the law. In his defence, the accused contended that at the material time he was about to deliver a wallet to one Aloysius, who had purchased the same from the accused's wife ('Ann'). At the end of the trial, rejecting the accused's defence of innocent carrier, the trial judge convicted the accused and sentenced him to mandatory death penalty on the first charge. Aggrieved by the conviction and sentence, the accused appealed. The issues that arose for determination, *inter alia*, were (i) whether the accused was under arrest when he uttered the words amounting to an admission of knowledge about the drugs in the said Kancil car; (ii) whether a statutory caution had been given to the accused; and (iii) failure of the learned trial judge to invoke adverse inference under s. 114(g) of the Evidence Act 1950 for failure on the part of the prosecution to call and produce Ann.

Held (allowing appeal; setting aside conviction and sentence)
Per Kamardin Hashim JCA delivering the judgment of the court:

(1) The trial judge did discuss the issue as to whether the accused was under arrest when he uttered the first statement that there was syabu in the car. The trial judge made a correct finding of fact that the first statement about the syabu in the car by the accused was obviously without any prior caution administered by PW7. The trial judge decided that the accused was not under arrest at the time when he uttered the first statement. Instead, the trial judge of the view that PW7 was merely making an inquiry immediately after the accused was stopped by the police. The trial judge further opined that the need to administer the caution under s. 37A (now 37B(1)(b)) of the Act only arises after actual arrest and not constructive arrest. However, the accused had been restrained and force was used to prevent the accused from driving away with the said Kancil car. This showed that arrest occurred at that time. Therefore, the trial judge had misdirected in fact and law in finding that no arrest had been made at the time when the accused uttered the first statement to the effect that there was syabu inside his car. Therefore, the trial judge erred in relying on the first statement to fasten knowledge of the impugned drugs to the accused person. This error and misdirection had occasioned a substantial miscarriage of justice to the accused person which warranted an appellate intervention. (paras 19, 20, 22 & 23)

(2) Not only on the issue of voluntariness of the statement but the caution itself, administered by PW7 was not in the proper words as provided under the relevant section and further the meaning of the caution, was never explained to the accused. In the caution administered by PW7, it was mentioned that 'Kamu adalah diwajibkan menjawab atau

menyatakan … ' which made it mandatory for the accused to give an answer to any question put to him by PW7. This is not the law. The exact words of caution is as provided under s. 37A(1)(b) of the Act. There was no evidence that PW7 had in fact mentioned and explained the exact words or words to the like effect to the accused. (paras 27 & 28)

(3) The only evidence against the appellant was merely of close proximity to the drugs in the Kancil car. The failure of the prosecution to call Ann had created a gap in the prosecution's case and would amount to a suppression of evidence and hence attracted the invocation of an adverse inference under s. 114(g) of the Evidence Act 1950 against the prosecution. The trial judge erred when His Lordship failed to do so in the instant appeal. (para 43)

Bahasa Malaysia *Headnotes*

Bertindak atas maklumat yang diterima, PW7 dan sepasukan polis telah ke satu lokasi tertentu ('lokasi tersebut'). Selepas 25 minit, sebuah kereta Kancil berwarna hitam ('kereta tersebut') tiba di lokasi tersebut. Hanya terdapat seorang lelaki di dalam kereta tesebut, yang kemudian dikenali pasti sebagai tertuduh. Pasukan polis kemudiannya bergegas ke arah kereta tersebut dan menangkap tertuduh. Selepas pemeriksaan, polis mendapati satu beg plastik, berwarna krim, diletakkan di kerusi penumpang depan kereta tersebut. PW7 kemudian melakukan pemeriksaan selanjutnya keatas beg plastik berwarna krim itu dan mendapati dua paket plastik berwarna hitam di dalamnya. Di dalam dua paket plastik itu, PW7 menemui empat paket plastik lut sinar yang mengandungi bahan kristal yang disyaki adalah 124.04g methamphetamine, perkara pertuduhan pertama. Siasatan lanjut membawa polis ke rumah tertuduh di mana tujuh paket plastik luts inar yang mengandungi bahan kristal yang disyaki sebagai methamphetamine dijumpai, perkara pertuduhan kedua. Tertuduh kemudiannya dituduh dengan dua kesalahan mengedar dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Tertuduh dibebaskan dan dilepaskan daripada pertuduhan kedua di akhir kes pendakwaan. Bagaimanapun, hakim bicara memerintahkan tertuduh memasukkan pembelaannya atas pertuduhan pertama. Hakim bicara berpendapat bahawa pihak pendakwaan telah membuktikan inti pati milikan melalui bukti langsung berdasarkan fakta bahawa tertuduh bersendirian di dalam kereta tersebut bersama-sama dengan dadah yang dijumpai di kerusi penumpang depan kereta tersebut. Oleh itu, hakim bicara mendapati bahawa tertuduh mempunyai hak penjagaan dan kawalan dadah tersebut. Bagi elemen pengetahuan, hakim bicara menerima keterangan PW7 bahawa tertuduh telah menyatakan perkataan 'Ada syabu di dalam plastik krim di sebelah kerusi bahagian penumpang' sebagai balasan kepada soalan PW7. Hakim bicara tidak mengguna pakai anggapan di bawah s. 37(d) Akta. Bagi unsur pengedaran, hakim bicara mengguna pakai

anggapan pengedaran di bawah s. 37(da)(xvi) Akta kerana jumlah dadah yang terlibat adalah melebihi berat minimum 50g sebagaimana yang diperuntukkan di bawah undang-undang. Dalam pembelaannya, tertuduh menghujahkan bahawa pada masa yang material, dia sedang menyerahkan dompet kepada seorang bernama Aloysius, yang telah membeli dompet daripada isteri tertuduh ('Ann'). Pada akhir perbicaraan, menolak pembelaan tertuduh sebagai pembawa tidak bersalah, hakim bicara mensabitkan tertuduh dan menjatuhkan hukuman mati mandatori atas pertuduhan pertama. Terkilan dengan sabitan dan hukuman, tertuduh merayu. Isu-isu yang timbul untuk penentuan, antara lain, adalah (i) sama ada tertuduh ditangkap ketika dia menyatakan kata-kata yang berjumlah pada pengakuan pengetahuan tentang dadah di dalam kereta tersebut; (ii) sama ada suatu amaran statutori diberikan kepada tertuduh; dan (iii) kegagalan hakim bicara untuk menguna pakai anggapan bertentangan di bawah s. 114(g) Akta Keterangan 1950 kerana kegagalan pihak pendakwaan memanggil dan mengemukakan Ann.

Diputuskan (membenarkan rayuan; mengetepikan sabitan dan hukuman) Oleh Kamardin Hashim HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara membincangkan isu sama ada tertuduh ditangkap ketika dia menyampaikan pernyataan pertama bahawa terdapat syabu di dalam kereta. Hakim bicara membuat penemuan yang betul tentang fakta bahawa kenyataan pertama tentang syabu di dalam kereta oleh tertuduh jelas tanpa sebarang amaran terlebih dahulu yang diberikan oleh PW7. Hakim bicara memutuskan bahawa tertuduh tidak ditangkap ketika dia menyampaikan pernyataan pertama. Sebaliknya, hakim bicara berpendapat bahawa PW7 hanya melakukan siasatan selepas tertuduh dihentikan oleh pihak polis. Hakim bicara selanjutnya berpendapat bahawa pemberian amaran di bawah s. 37A (sekarang 37B (1)(b)) Akta hanya timbul selepas penangkapan sebenar dan bukan penangkapan konstruktif. Bagaimanapun, tertuduh telah ditahan dan paksaan digunakan untuk menghalang tertuduh daripada memandu kereta tersebut. Ini menunjukkan bahawa penangkapan berlaku pada masa itu. Oleh itu, hakim bicara telah menyalahgunakan fakta dan undang-undang apabila mendapati tertuduh belum ditangkap semasa menyampaikan pernyataan pertama bahawa terdapat syabu di dalam keretanya. Oleh itu, hakim bicara terkhilaf apabila bersandarkan pada pernyataan pertama untuk mengikat pengetahuan dadah terhadap tertuduh. Kesilapan dan kekhilafan ini menyebabkan ketidakadilan ke atas dituduh yang mewajarkan campur tangan rayuan.

(2) Bukan sahaja mengenai isu kesukarelaan pernyataan malahan amaran yang diberikan oleh PW7 bukan dalam kata-kata yang betul sebagaimana yang diperuntukkan di bawah seksyen yang berkaitan dan selanjutnya tidak pernah dijelaskan kepada tertuduh makna amaran itu. Dalam amaran yang diberikan oleh PW7, disebutkan bahawa 'Kamu adalah diwajibkan menjawab atau menyatakan ...' yang mewajibkan

tertuduh memberi jawapan kepada apa-apa soalan yang dikemukakan kepadanya oleh PW7. Ini bukan undang-undang. Kata-kata amaran yang tepat adalah seperti yang diperuntukkan di bawah s. 37A(1)(b) Akta tersebut. Tiada bukti bahawa PW7 sebenarnya telah menyebut dan menerangkan perkataan atau kata-kata yang tepat untuk memberi kesan yang sama kepada tertuduh.

(3) Satu-satunya bukti terhadap perayu hanyalah kedekatannya dengan dadah di dalam kereta tersebut. Kegagalan pihak pendakwaan untuk memanggil Ann telah mewujudkan jurang dalam kes pendakwaan dan akan menjadi penindasan bukti sehingga menarik kegunaan anggapan bertentangan di bawah s. 114(g) Akta Keterangan 1950 terhadap pendakwaan. Hakim perbicaraan terkhilaf apabila gagal mengguna pakai anggapan bertentangan dalam rayuan ini.

Case(s) referred to:
Francis Antonysamy v. PP [2005] 2 CLJ 481 FC ***(refd)***
Jayaraman Velayuthan & Ors v. PP [1982] CLJ 464; [1982] CLJ (Rep) 130 FC ***(refd)***
John Nyumbei v. PP [2007] 2 CLJ 509 CA ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
PP v. Lim Hock Boon [2009] 3 CLJ 430 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 112
Dangerous Drugs Act 1952, ss. 37(d), (da)(xvi), 37B(1)(b), 39B(1)(a), (2)
Evidence Act 1950, ss. 32(1), 114(g)

For the accused - Nelson W Angang; M/s Aklee Chua & Angang
For the prosecution - Jasmee Hameeza Jaafar; DPP

[Editor's note: Appeal from High Court, Sandakan; Criminal Trials No: SDK-45A-1/7-2014 & SDK-45A-2/8-2014 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

Kamardin Hashim JCA:

Introduction

[1] The accused was charged with two offences of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s. 39B(2) of the same Act.

[2] Particulars of the two charges were as follows:

Case No: SDK-45A-1/7-2014 ('1st Charge')

That you, on 15-11-2013 at about 3.00pm, at the back side of Syarikat Victory Auto Parts, Hing Lee 1 Street, Mile 3, Sandakan, in the state of Sabah, did on your own behalf, trafficked in a dangerous drugs *to wit*

124.04 gram of Methamphetamine and that you have thereby committed an offence under Section 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) and punishable under Section 39B(2) of the same Act.

Case No: SDK-45A-2/8-2014 ('2nd Charge')

That you, on 15-11-2013 at about 3.45pm at Lorong E60, Jambatan E, Rumah Murah Sim-Sim, Sandakan, in the state of Sabah, did on your own behalf, trafficked in a dangerous drugs *to wit* 215.6 gram of Methamphetamine and that you have thereby committed an offence under Section 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) and punishable under Section 39B(2) of the same Act.

[3] The accused was acquitted and discharged of the second charge by the learned trial judge at the end of the prosecution's case. Aggrieved, the Public Prosecutor appealed to this court against the acquittal. However, the learned trial judge ordered the accused to enter upon his defence on the first charge.

[4] At the end of the trial, the learned trial judge convicted the accused and sentenced him to suffer the mandatory death penalty on the first charge. Aggrieved by the conviction and sentence, the accused likewise appealed to this court.

[5] We heard both the appeals together on 25 September 2017. At the outset, the learned Deputy Public Prosecutor ('the learned Deputy') withdrew their appeal against the acquittal. We struck-out the prosecution's appeal and we affirmed the acquittal of the accused on the second charge.

[6] After hearing the parties and after perusing the appeal records, we allowed the accused's appeal in respect of the first charge. We set aside the conviction and sentence imposed by the learned trial judge. We now give our grounds of doing so.

The Prosecution's Case

[7] The prosecution's case may be summarised as follows:

(a) Acting on an information received, on 15 November 2013 at about 1.30pm, Inspector Wan Mohd Ismail bin Wan Aziz (PW7) assembled a team of ten policemen and conducted a briefing regarding a drug trafficking activity behind the premises of Syarikat Victory Auto Part, Mile 3, Sandakan;

(b) During the briefing, PW7 divided his team into four teams with specific instruction given to each team. They proceeded to the said location and after waiting for about 25 minutes a black Kancil with registration No. SS9200J ('the said Kancil') came and was parked behind Syarikat Victory Auto Parts. There was only one man inside the car, later identified as the accused. The police team then rushed to the car and apprehended the accused;

A (c) Upon inspection, the police found one plastic bag, cream in colour, placed in the front passenger seat of the said Kancil. PW7 then conducted further checks on the cream plastic bag (P12(1)) and found two black plastic packets inside it. Inside the two plastic packets, PW7 found four transparent plastic packets containing crystallised substance
B suspected to be methamphetamine;

(d) The accused was then arrested. Further investigation was carried out which led the police to the accused's house where seven transparent plastic packets containing crystallised substance suspected to be methamphetamine were found;

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(e) The crystallised substance found in the transparent plastic bag found in the said Kancil car was sent for analysis at Jabatan Kimia Kota Kinabalu and upon analysis by the chemist, Billing AK Peter Raig (PW3) confirmed that it was methamphetamine with pure weight of 124.04g.

D **[8]** The learned trial judge accepted the evidence of PW3 on the drug analysis undertaken by the witness. There was no defect in PW3's analysis and there was no challenge by the defence on the identity of the drugs exhibits. The learned trial judge accepted the evidence of PW3 as to the type and weight of the drugs, the subject matter of the first charge.

E **[9]** As for the element of possession, the learned trial judge held that the prosecution had proven the element of possession by way of direct evidence based on the fact that the accused was alone in the said Kancil car together with the impugned drugs found in the front passenger's seat of the said Kancil car. Therefore, the learned trial judge found that the accused had custody and
F control of the said drugs. As for the element of knowledge, the learned trial judge accepted the evidence of the raiding officer, Inspector Wan Mohd Ismail bin Wan Aziz (PW7) that the accused had uttered the words "Ada syabu di dalam plastik krim di sebelah kerusi bahagian penumpang" in response to PW7's question. The learned trial judge did not invoke the
G presumption under s. 37(d) of the Act.

[10] As for the element of trafficking, the learned trial judge invoked the presumption of trafficking under s. 37(da)(xvi) of the Act as the amount of the drugs involved was more than the minimum weight of 50g as provided under the law.

H **[11]** After being satisfied that all the elements of the first charge had been proven and after finding that the evidence adduced by the prosecution's witnesses are credible and reliable, the learned trial judge held that the prosecution had established a *prima facie* case against the accused on the first charge. Thus, the accused was called upon to enter his defence.

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The Defence

[12] The accused elected to give evidence under oath. The accused was the sole witness for the defence. The accused's defence had been summarised by the learned trial judge in his judgment at pp. 34 - 35 of the appeal record vol. 1, as follows:

> [56] The Accused in his defence contended that at the material time he was about to deliver a wallet to one Aloysius, who had purchased the same from the Accused's wife. According to the Accused, the said wallet was wrapped and kept/placed inside the same plastic bag found in the front passenger's seat of the car.
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> [57] The Accused claimed that he did not check the actual content of the plastic bag and told the court that he trusted his wife. He also said he was helping his wife in her business by delivering their orders. In short the Accused was denying any knowledge of the presence of the drug found in the said car dan contended that he was merely delivering the purported wallet to a man called Aloysius.

[13] After considering the accused's version, the learned trial judge found that the accused had not succeeded in creating a reasonable doubt in the prosecution's case. The learned trial judge further held that the accused had failed to rebut the presumption of trafficking under s. 37(da)(xvi) of the Act invoked against him, on the balance of probabilities.

[14] The learned trial judge rejected the accused's defence of an innocent carrier holding that the accused's conduct was deliberate in shutting his eyes to the obvious. The learned trial judge further commented in his judgment that the accused chose to act blindly. There was no evidence to suggest that the accused had been deprived of an opportunity to examine the contents of the cream plastic bag. Hence, the defence of innocent carrier is not applicable to the accused as he had only showed that he was an ignorance *simpliciter*.

[15] The accused was thus convicted and sentenced to death on the first charge as proffered. Hence the appeal before us.

The Appeal

[16] Before us, learned counsel for the accused canvassed four main issues, namely:

(a) Whether the accused was under arrest when he uttered the words amounting to an admission of knowledge about the impugned drugs in the said Kancil car;

(b) Whether a statutory caution had been given to the accused;

(c) Failure of the learned trial judge to consider the evidence of PW8 which corroborated the defence of the accused; and

(d) Failure by the prosecution to call and to produce the wife of the accused.

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Our Deliberation And Decision

[17] The crux of learned counsel's complaint was mainly centered on the learned trial judge's findings of fact and on the evaluation of the evidence of the prosecution's case. Learned counsel argued that had the learned trial judge properly and adequately consider the evidence of the prosecution's witnesses, the learned trial judge would have come to a different finding in that the prosecution's case was short of proving a *prima facie* case and the accused's defence should not have been called by the learned trial judge. All the four issues raised by learned counsel related to the learned trial judge's findings on the *prima facie* case.

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[18] We deal with the first and second issues raised by learned counsel together as the two were inter-related. On the issue of arrest, learned counsel argued that the learned trial judge erred in making a finding that there was no arrest made by the police and that PW7 was merely making an inquiry towards the accused in which it was alleged that the accused made a statement saying there was syabu. Learned counsel submitted that the alleged statement made by the accused should have not been admitted and considered by the learned trial judge as it was made after his arrest and before any caution was administered.

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[19] We agreed with learned counsel. We are of the considered opinion that there is merit in learned counsel's complaint. As we alluded to earlier, the learned trial judge relied on the answer given by the accused that "Ada syabu di dalam plastik krim di sebelah kerusi bahagian penumpang" as the sole basis for the learned trial judge to form his finding that the accused had the prerequisite knowledge. The learned trial judge also relied on direct evidence to fasten the element of knowledge and possession of the impugned drugs against the accused. The relevant findings of the learned trial judge on this issue can be seen at pp. 17-18 of the appeal record vol. 1, as follows:

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> [17] From the above evidence, it is not disputed that the Accused was alone in the Kancil car at the time of the arrest. Nobody was seen leaving or entering the Kancil car throughout observation by PW7 before the police team approached the Kancil car. In fact, immediately after PW7 asked the Accused whether there is any illegal substance (barang salah) the Accused answered that there is 'syabu' in the cream plastic packet. This answer implies that the Accused is having both the custody and control of the said drug at the time of the arrest.
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> [18] With regard to the ownership of the car, it is proven through Lai Pui Hiung (PW11) that the Kancil car was sold to the Accused in 2014. Prior to the sale, PW11 bought the Kancil car from Lai Pui Tzen (PW10) but the transfer of the car was not registered on the registration card of the vehicle. PW11 also confirmed that after the sale to the Accused, he (PW11) did not use the said car.
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> [19] Based on the above facts, it is safe to conclude that the Accused has both the control and custody of the said drug found in the front passenger's seat of the Kancil car.

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[20] The learned trial judge did discuss the issue as to whether the accused was under arrest when he uttered the first statement that there is syabu in the car. The learned trial judge made a correct finding of fact that the first statement about syabu in the car by the accused was obviously without any prior caution administered by PW7. The learned trial judge referred *Jayaraman Velayuthan & Ors v. PP* [1982] CLJ 464; [1982] CLJ (Rep) 130 for the meaning of arrest before deciding that the accused was not under arrest at the time when he uttered the first statement. Instead, the learned trial judge of the view that the police (PW7) was merely making an inquiry immediately after the accused was stopped by the police. Learned trial judge further relied on *PP v. Lim Hock Boon* [2009] 3 CLJ 430 where Nik Hashim FCJ opined that the need to administer the caution under s. 37A (now 37B(1)(b)) of the Act only arises after actual arrest and not constructive arrest.

[21] Learned counsel argued that the accused was actually under arrest when he uttered the impugned remark that there was syabu in the said Kancil car. Learned counsel's submission was based on the facts and circumstances prevailing in this case to show that the accused was actually under arrest when the so-called inquiry was done by PW7. We had the opportunity to peruse the evidence from the appeal records. It was the evidence of Detective Sergeant Major Abdul Gani bin Behram (PW2), a member of the raiding party which stated that when they ambushed the accused's car, PW2 had used his car to block the accused's car before PW2 with three other members of the raiding team alighted from PW2's car and surrounded the accused's car. Corporal Amiran, a member of the team then went to the driver's side and took the accused's car key off from the ignition and restrained the accused. The evidence of PW2 at p. 98 of the appeal record vol. 2 as follows:

> Q: Boleh ceritakan lebih lanjut apakah yang berlaku setelah kamu memandu kereta kamu menghalang kereta yang dipandu oleh saspek/tertuduh?
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> A: Apabila kami sampai dan menghalang kereta suspek, saya dan Korp Amiran bersama Korp Azlan dan Korp Elizabeth turun dari kereta saya sendiri, dan pada masa itu, Korp Amiran pergi ke tempat pemandu saspek (kereta Sang Kancil - right hand drive) untuk menahan saspek dan mengambil kunci kereta, manakala pada masa itu, tertuduh berada di dalam kereta duduk di tempat pemandu, dan saya berada di sebelah kiri kenderaan suspek … .

[22] We agreed with learned counsel's submission that the accused had been restrained and that force was used to prevent the accused from driving away with the said Kancil car. The conducts by the raiding team headed by PW7, to us, clearly show that the arrest occurred at that time. We observed that the word used was "menahan" and the word used by the learned Deputy Public Prosecutor in his question "menghalang" denotes a positive act which

A amounted to an arrest. This is consistent with the meaning of arrest enunciated by Suffian LP in *Jayaraman Velayuthan & Ors*, *supra*, where His Lordship opined:

> An arrest occurs when the police states in terms that he is arresting or when he uses force to restrain the individual concerned. It occurs also
B when by words or conduct he makes it clear that he will if necessary, use force to prevent the individual from going where he may want to go. It does not occur when he stops an individual to make inquiries.

[23] We agreed with learned counsel's submission that the learned trial judge had misdirected in fact and law when His Lordship made a finding that
C no arrest had been made at the time when the accused uttered the first statement to the effect that there was syabu inside his car. Therefore, the learned trial judge erred when His Lordship relied on the first statement to fasten knowledge of the impugned drugs to the accused person. This error and misdirection had occasioned a substantial miscarriage of justice to the
D accused person which warranted an appellate intervention.

[24] On the second issue which related to an admission by the accused which was given after a caution had been administered by PW7, learned counsel argued that learned trial judge erred when His Lordship relied on the second statement by the accused that there was drug in the car on the ground
E that the second statement had been withdrawn by the learned Deputy in the court below and the record regarding the same had been consequently expunged.

[25] The prosecution in the court below produced the police report (P43) made by PW7 to prove that the accused had knowledge of the drugs in the
F car. In P43, PW7 stated that after administering the caution under s. 37A(1)(b) of the Act (now s. 37B(1)(b)) he asked the accused what was inside the cream package found inside the accused's car and the answer given by the accused was "syabu". The prosecution had intended to introduce this evidence against the accused to prove knowledge on the part of the accused
G about the impugned drugs. This was strongly rejected by the learned defence counsel. The learned Deputy at the same time introduced the same piece of evidence through the oral evidence of PW7 facing the same objection from the learned defence counsel. This indicated that a *voir dire* have to be convened by the learned trial judge before the second statement, which
H amounted to an admission, to be accepted as evidence of the prosecution.

[26] The relevant part of PW7's oral evidence on this point can be found at p. 208 of the appeal record vol. 2(1) which we produced below:

> Q : Tadi kamu katakan kamu telah mengenalkan diri sebagai polis. Apa yang telah kamu lakukan selepas itu?
I
> A : Saya bertanya kepada lelaki tersebut samada terdapat barang salah. Kemudian lelaki tersebut menjawab "ada syabu di dalam plastik warna krim di sebelah kerusi bahagian penumpang". Kemudian

> sebelum melakukan pemeriksaan terhadap plastik krim tersebut saya telah memberikan kata-kata amaran di bawah Seksyen 37A(1)(b) ADB 1992. "*Adalah menjadi kewajipan saya untuk memberi amaran kepada kamu. Dan kamu adalah diwajibkan menjawab atau menyatakan apa-apa tetapi apa jua yang kamu nyatakan boleh dijadikan sebagai keterangan*". Setelah difahami oleh lelaki tersebut saya tanyakan kepada lelaki tersebut apa yang ada dalam plastik krim tersebut. Kemudian lelaki tersebut menjawab ada dadah syabu ... (emphasis added).

[27] We understand the objection taken by learned counsel in the court below not only on the issue of voluntariness of the statement but as well as the caution itself administered by PW7 was not in the proper words as provided under the relevant section and further it was never explained to the accused the meaning of the caution. In the caution administered by PW7, it was mentioned that "kamu adalah diwajibkan menjawab atau menyatakan …" which is mandatory for the accused to give an answer to any question put to him by PW7. This is not the law. The exact words of caution used under s. 37A(1)(b) of the Act were in following words:

> (b) in the case of a statement made by such person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect:
>
> > It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence:
> >
> > > Provided that a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by giving reason of no such caution having been given if it has been given as soon as possible.

[28] We did not find any evidence in the appeal records that PW7 had in fact mentioned and explained the exact words or words to the like effect to the accused in this case before us. The proper administration of the statutory caution is a prerequisite to the admissibility of any confession or an admission.

[29] In *Francis Antonysamy v. PP* [2005] 2 CLJ 481, Augustine Paul JCA (as he then was) had the occasion to decide on the same issue as follows:

> … it must be observed that the need to administer the caution as required by s. 113(1)(a)(ii) is an explicit endorsement and preservation of the privilege against self-incrimination as it gives the accused the option to remain silent. It is perhaps to ensure that this privilege is not diluted in any way that's 113(1)(a)(ii) provides that a statement made by a person after his arrest shall not be admissible in evidence "... unless the court is satisfied that a caution was administered to him in the following words or words to the like effect …" it can therefore be seen that the satisfaction of the court on the administration of the caution goes to the very root

of the admissibility of a statement that had been made. What requires consideration is whether a mere reading of the caution will amount to the court being 'satisfied' that it had been administered.

[30] We found that the learned trial judge had fallen into error when His Lordship proceeded to consider and relied on the accused's admission to fasten the element of knowledge when the evidence regarding the admission had been expunged at the request of the learned Deputy in the court below. These could be seen from the appeal record vol. 2(1) at pp. 229-230, as follows:

Q: Semalam kamu beritahu Mahkamah bahawa setelah membuat pemeriksaan terhadap kereta kancil yang dipandu oleh tertuduh kamu ada memberi kata-kata amaran betul?

A: Ya.

Q: Jika saya tunjukkan kata-kata amaran, boleh kamu camkan?

A: Boleh.

DPP: Section 37A(1)(b) still enforce during the crime.

DC: If the statement were to be tendered to the witness and to the court the Defence will have to apply for the trial within the trial. This is the requirement of the law. So I am seeking Your Lordship direction.

Pray to stand down to this afternoon.

DPP: I agree with my learned friend.

DC: There are 2 caution statement allegedly made by the police. We will be challenging.

Court: Section 37A(1)(b) has been renumbered as Section 37B(1) with effect from 15.02.2014. Hence caution statement is still admissible subject to the requirements/conditions stated therein. If prosecution wish to tender the statement a trial within a trial is necessary. Therefore court adjourn to 2.00 p.m.

11.25 a.m

Court resume @ 2.15 P.M.

Parties as before.

DPP: Prosecution decided not to tender the caution statement.

DC: I will not proceed with the trial within trial.

DPP: I would like to call PW7 for continuation of Examination in Chief.

[31] It is irrefragable from the notes of evidence that the learned Deputy had in fact withdrawn their effort to put in the admission by the accused as part of their evidence. This was overlooked by the learned trial judge.

[32] The learned trial judge proceeded to hold that the statutory caution had been properly administered by PW7 and the statement given by the accused was admissible. Based on that findings, the learned trial judge ruled that the accused had the prerequisite knowledge and thus had possession of the impugned drugs. The findings and ruling of the learned trial judge can be found from pp. 22 to 25 of the appeal record vol. 1 which we produce below:

> [31] The next issue to be determined is whether the Accused has the knowledge of the drugs found in the said cream plastic bag.
>
> [32] At this stage it is pertinent to state that the first statement made by the Accused to PW7 also indicate that he has the knowledge the nature of the said drug in the cream plastic bag. Be that as it may, after the accused made the first statement PW7 proceeds to administer the caution under Section 37B(1)(b). After ascertaining that the Accused understood the caution PW7 asked him what is the content of the cream plastic bag to which the Accused replied there is syabu.
>
> [33] Section 37B(1)(b) of the Act provides that any statement made by the Accused after his arrest is admissible if the court is satisfied that the caution is administered to him. This section provides:
>
> (b) In the case of a statement made by such person after his arrest, unless the court is satisfied that the caution was administered to him in the following words or words to the like effect:
>
> > It is my duty to warn you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.
> >
> > Provided that a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having be given if it has been given as soon as possible.
>
> [34] I have reproduced the cautionary words administered by PW7 to the Accused in paragraph 15 above. It would appear that PW7 did not administer the exact cautionary words under paragraph (b). At the later part of the caution PW7 said:
>
> … tetapi apa jua yang kamu nyatakan boleh dijadilkan keterangan …
>
> It is obvious that PW7 had omitted to add "Samada dalam menjawab apa-apa soalan atau tidak …" in his caution.
>
> [35] In my opinion such omission is not fatal because under paragraph (b) the court must be satisfied that the caution was administered following the words in that paragraph or "words to the like effect". (emphasis added). In my opinion the words "apa-apa yang kamu nyatakan" would mean anything said by the Accused be it in answer to a question or not. It is wide enough to cover the cautionary words under paragraph (b). In my opinion the caution administered by PW7 carries the same meaning

A as the statutory caution under paragraph (b). Therefore I rule that the statutory caution had been properly administered by PW7 and the statement given by the Accused is admissible.

[36] After the Accused said the cream plastic bag contain syabu, PW7 checked the contents of same and found that it contain clear crystallised B substance which was later confirmed to be Methamphetamine, the subject matter of the present case.

[37] Further the fact that the Accused pleaded to PW7 to be given another chance and promise to cooperate with the police show that he know the content of the cream plastic bag. He has the knowledge that he was carrying drug in the said plastic bag found on the front passenger seat C of the said Kancil. In my opinion, the prosecution has adduced credible direct evidence that the Accused has the knowledge of the nature of the drug.

[38] Based on the aforesaid reasons, I am satisfied that the prosecution has proven that the Accused was in possession of the said drug at the D material time and I so rule.

[33] From the above, it is clear that the findings of the learned trial judge was perverse and warrants an appellate intervention.

[34] In regard the third ground of appeal, learned counsel's complaint was E that the learned trial judge had failed to take into consideration the evidence of PW8, Lau Fung Kwan @ Lau Mui who is the grandmother of the accused who had in her evidence corroborated the accused's evidence that he is helping his wife to deliver an order. The evidence of PW8 which corroborated the accused version which had not been considered by the F learned trial judge can be found at pp. 285-286 of the appeal record vol. 2(1) as follows:

Q: Ho Tze Kean ada memberitahu kamu sebelum dia beredar dari rumah pada hari tersebut bahawa dia juga keluar untuk membantu isterinya Ann menghantar barang pesanan daripada pelanggan Ann dalam perniagaannya yang menjual beg duit dan pakaian. Setuju?

G

A: Ada. Dia bercakap "Nenek, saya tolong Ann hantar barang kepada kawannya".

[35] We have perused the learned judge's grounds of judgment and we agreed that His Lordship did not at all consider the evidence of PW8 which H supported the accused's defence. The learned judge commented that it is highly improbable that the accused's wife would have framed her husband into the commission of an offence. This is not the defence's version. The defence's version was that the accused was just helping the wife in her business. Without considering the evidence given by PW8 which I corroborated the accused's evidence coupled with the fact that the accused's wife had gone into hiding, the learned trial judge branded the accused as an ignorance *simpliciter* for not examining the contents of the cream plastic bag.

[36] In *John Nyumbei v. PP* [2007] 2 CLJ 509 this court had decided as follows:

> Now, among the general rules that govern judicial appreciation of evidence in both civil and criminal cases in the adversarial system of justice **there is one fundamental importance. It is that a party is bound by the evidence of witnesses whom he calls in proof of his case**. See *M Ratnavale v. Lourdenadin* [1988] 2 MLJ 371. (emphasis added).

[37] The piece of evidence given by PW8 which supported the defence's version was not challenged and not even rebutted by the prosecution. Yet, we found that this piece of evidence was not considered by the learned trial judge when His Lordship evaluated the defence case.

[38] In regard to the final ground of appeal, learned counsel's complaint was on the failure of the learned trial judge to invoke adverse inference under s. 114(g) of the Evidence Act 1950 for failure on the part of the prosecution to call and produce the accused's wife, Virgie Tesara Calsena (Ann) to court to give evidence. From the appeal records, it showed that there was an attempt by the prosecution to introduce as evidence Ann's statements under s. 112 of the Criminal Procedure Code but was rejected by the learned trial judge on the ground that precondition under s. 32(1) of the Evidence Act 1950 had not been satisfied. The ruling made by the learned trial judge can be found at p. 355 of the appeal record vol. 2(1) as follows:

> Court: Before Section 32 can be invoked, it must be shown that the requirement under section 32 i.e. the maker is dead or cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense. In this case besides the evidence of PW11 that he has tried to locate the witness through his query with accused's grandmother, there is no evidence to show that sufficient attempts have been made. At the very least the prosecution could check with the Immigration department on the movement of the witness. Hence I am of the opinion that the requirement under section 32(1) have not been fulfilled and I rule that it is inadmissible.

[39] It is trite that when witnesses are not called or produced in court, the court would be obliged to invoke the adverse inference under s. 114(g). Only if the witness is a material witness which forms part of the narrative of the prosecution's case and that there was evidence of suppression or withholding of evidence only then that the adverse inference under s. 114(g) of the Evidence Act 1950 can be invoked against the prosecution (see *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492).

[40] We have the opportunity to peruse the appeal records to determine what role played by Ann in this case. It was at all time the defence case that the appellant was asked by Ann to help her to send her order. This fact was

A also confirmed by PW8 as we alluded to earlier in our judgment. This evidence was not challenged and came from the prosecution own witness. What can safely be deduced from here is that the police had the prior knowledge for such information. We are of the considered view that Ann is an important witness which form part of the narrative of the prosecution's
B case. It is trite that the failure to call or offer the material witness would trigger the adverse inference under s. 114(g) of the Evidence Act 1950, against the prosecution.

[41] From the records, we observed that the police had recorded a statement under s. 112 of the CPC from Ann. This can be seen from the
C evidence of PW11 at p. 338 of the appeal record vol. 2(1) as follows:

Q : Adakah kamu dalam siasatan kamu merakam keterangan seorang saksi bernama Virgie Tesara Calsena semasa dalam siasatan kamu?

A : Ada.

D Q : Siapakah saksi yang bernama Virgie Tesara Calsena?

A : Saksi tersebut adalah isteri kepada tertuduh yang tinggal bersama-sama di rumah no. E60 Jambatan 6 Perumahan murah Sim Sim Sandakan.

Q : Adakah kamu ingat bila tarikh rakaman percakapan dilakukan?

E A : Saya tidak ingat tarikh.

Q : Jika saya tunjukkan rakaman percakapan boleh kamu camkan?

A : Boleh.

F DC: I object to the introduction of this alleged 112 statement of the named person.

[42] Naturally the defence objected to the prosecution application to introduce the alleged 112 statement. Their main reason was that there was no evidence that sufficient efforts were made to ensure the attendance of Ann
G though she was an important witness. The evidence showed that PW11 had only attempted service of the subpoena on Ann with only a single visit to her residence at No. E60 Jambatan 6, Rumah Murah Sim-Sim, Batu 3, Sandakan. There were no other efforts undertaken by PW11. We agreed that the efforts taken by PW11 were not sufficient to satisfy preconditions as provided under s. 32(1) of the Evidence Act 1950. We observed the efforts
H taken by PW11 at p. 341 of the appeal record vol. 2(1) as follows:

Q: Boleh kamu nyatakan apakah usaha yang kamu jalankan untuk mengesan saksi bernama Virgie Tesara Calsena untuk hadir di Mahkamah untuk menjadi saksi kepada kes ini?

I A: Saya pernah apply subpoena untuk penama saksi tersebut namun saya masih gagal untuk mengesan dan menyerahkan subpoena. Setelah saya bersama anggota saya pernah pergi ke rumah tempat

tinggal saksi tersebut di no. E60 Jambatan 6 Rumah Murah Sim-Sim Batu 3 Sandakan tetapi setelah dimaklumkan oleh nenek Ho Tze Kean sendiri mengatakan saksi tersebut telah melarikan diri dari rumah tersebut.

[43] We are of the considered view that the measures undertaken by the police were woefully inadequate. For the failure by the prosecution to call Ann or to successfully put in her 112 statement, the prosecution had failed to exclude the possibility of access by others to the said impugned drugs and to answer the question as to who was the real trafficker. The only evidence against the appellant was merely of close proximity to the drugs in the Kancil car. Therefore, the failure of the prosecution to call Ann had created a gap in the prosecution's case and would amount to a suppression of evidence hence attract the invocation of an adverse inference under s. 114(g) of the Evidence Act 1950 against the prosecution. It is our judgment that learned trial judge erred when His Lordship failed to do so in the instant appeal.

Conclusion

[44] In the upshot, we found merits in the appeal. We were satisfied that the conviction of the accused was not safe. Therefore, the appeal is allowed. We set aside the conviction and sentence of the High Court.